Supreme Court, U. S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1918

IN THE

Supreme Court of the United States

OCOTBER TERM, 1979

CARY HAWKINS AND MICHAEL HOLDERFIELD,
Petitioners,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation,
Appellee/Respondent.

Brief in Opposition

[redacted]I

TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

W. O. MACMAHON, III
600 City Hall
Birmingham, Alabama 35203
Attorney for Appellee/Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions Cited By Petitioners That Appear Erroneous .	1
Jurisdiction	2
Questions Presented	2
Statement of the Cases	4
Reasons for Denying the Writs	5
Conclusion	17

TABLE OF CITATIONS

Associated Industries of Alabama v. State, 314 So.2d 879, 55 Ala.App. 277	10
Birmingham v. Evans, 53 Ala.App. 358, 300 So.2d 396	5
City of Birmingham v. Williams, 229 Ala. 101, 155 So. 877	5
Costello v. Flagin, 169 Ala. 191, 50 So. 134	5
Donahey v. City of Montgomery, 43 Ala.App. 20, 178 So.2d 832	5
Duncan v. La., 391 U.S. 145, 88 S.Ct. 1944	6,7
Ex parte Hall, 255 Ala. 98, 50 So.2d 264	6
Ex parte State ex rel City of Birmingham, 164 Ala. 576, 51 So. 309	5
Goodman v. Kennedy, 329 A2d 224	9
Gutknecht v. City Sausalitio, 117 Cal.Rptr. 782	9

Hawkins v. City of Birmingham, 380 So.2d 994 6

Holderfield v. City of Birmingham, 380 So.2d 990 6

Howell v. City of Birmingham, Ala.Crim.App. 6 Div. 916 (Ms. January 22, 1980) 6

Jenkins v. Georgia, 94 S.Ct. 2750 15,16

Knox v. State, 172 So.2d 787, 42 Ala. 578 14

John F. Lawhon Furniture Co. v. Melvin Bailey (D.C. Ala. CA 72-1109 8

Ludwig v. Massachusetts, 96 S.Ct. 2781 (1976) 5

McKinstry v. City of Tuscaloosa, 172 Ala. 344, 54 So. 629 6

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1974) 13,16

Mulhern v. McHenry, 326 A2d 132 9

Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501 9,11

People v. Dobbs Ferry Medical Pav. Inc., 321 U.S. 1, 64 S.Ct. 397 9

People ex rel Moylan v. Kur, 350 NYS2d 990 9

People v. Lofton, 366 NYS2d 769 9

People v. Pestronk, 157 NYS2d 492, 493, 3 Misc2d 845 . 2

People v. Plamondon, 236 NW2d 86 9

People v. Thomas, 542 P2d 387 9

People v. Utica Daw's Drug Co., 225 NYS2d 136 10,11

People v. Wegman's Food Market, Inc., 362 NYS2d 902 9

Simonetti v. City of Birmingham, 55 Ala.App. 163, 314 So.2d 83 (1975) 7

Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397 9,13

State v. Deddens, 542 P2d 1124 9

State v. Luck, 353 So.2d 225 6

State v. Solomon, 254 S.C. 550 9

Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 38 S.Ct. 495 10

Two Guys v. McGinley, 366 U.S. 582, 81 S.Ct. 1135 ... 11

United States v. Brookshire, 514 F2d 786 9

United States v. Character, 568 F2d 442 14

United States v. Elliott, 266 F.Supp. 318 9

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 9-,11,12

MISCELLANEOUS

City of Birmingham Ordinance 16-18, as amended 3,4,11

§12-14-6 Code of Alabama 1975 5,6

Title 28, U.S.C.A. §1257(3) 2

No. 79-1918

IN THE

Supreme Court of the United States

OCOTBER TERM, 1979

CARY HAWKINS AND MICHAEL HOLDERFIELD,
Petitioners,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation,
Appellee/Respondent.

MOTION TO DENY WRITS OF CERTIORARI TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

The Appellee/Respondent respectfully prays that the Writs of Certiorari be denied Petitioners for review of the opinions and judgments of the Alabama Court of Criminal Appeals entered against them on December 4, 1979.

OPINIONS CITED BY PETITIONERS THAT APPEAR ERRONEOUS

The original opinions appearing on Appendix A, A.1, and Appendix C, A.10 apparently did not contain, *Rehearing*

Denied January 22, 1980 but appeared in 380 So.2d 990 and 380 So.2d 994 respectively. Further in Appendix C, A.10 no reference to 380 So.2d 990 nor the date in December can be found by the City in the body of the Court's original opinion. (Emphasis added)

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. §1257(3). (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending cases. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioners do not in the opinion of the writer present new questions for the first time nor present any special or important reason for granting writs of certiorari. It appears that these cases are not one of the first impression and that the following quotation is applicable.

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S.2d 492, 493, 3 Misc.2d 845."

QUESTIONS PRESENTED

I.

Is the constitutional right to a jury trial satisfied by a two-tier court system?

II.

Is the constitutional right of trial by jury mandated in trials for violation of city ordinances in municipal courts?

III.

In order for the constitutional right to a jury trial to be raised must there be a demand for a jury trial and a refusal by the court to grant it?

IV.

Was the City of Birmingham Ordinance 16-18, as amended, systematically and selectively enforced or administered by the public authority of said City against Cary Hawkins and Michael Holderfield with an evil eye and unequal hand which resulted in a unjust, illegal, intentional discrimination against them as compared with other persons in similar circumstances, thereby violating their rights under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

V.

If an affidavit in the arrest warrant presented to the magistrate is later ruled conclusionary will the affidavit along with presentation of alleged obscene matter to said magistrate be sufficient to support findings of probable cause and the issuance of a warrant for defendant's arrest on the charge of sale of allegedly obscene matter?

VI.

Is the reviewing court restricted to examining the four corners of the affidavits in passing on the validity of arrest warrants.

STATEMENT OF THE CASES

The body of the complaints read as follows:

"Comes the City of Birmingham, a municipal corporation and complains that Cary Hawkins, within twelve months before the beginning of this prosecution, on to-wit: May 10, 1978, and within the City of Birmingham, or the police jurisdiction thereof, at to-wit: 7610 1st Avenue North, Pussycat Adult Theatre, knowingly and unlawfully sold an obscene book or magazine or matter entitled "Locker-Room Workout" to D. L. McNutt which depicted or portrayed the following sexual conduct: Actual act or acts of homosexuality between males, contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended." and

"Comes the City of Birmingham, a municipal corporation and complains that Michael Holderfield, alias Mike Holderfield, within twelve months before the beginning of this prosecution, on to-wit: May 10, 1978 and within the City of Birmingham, or the police jurisdiction thereof, at to-wit: 3021 Bessemer Road, Bessemer News, knowingly and unlawfully sold an obscene book or magazine or matter entitled "Color Sperma" to D. L. McNutt which depicted or portrayed the following sexual conduct: Actual act or acts of fellatio, sexual intercourse, contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

REASONS FOR DENYING THE PETITIONS FOR WRITS OF CERTIORARI

No new substantial constitutional questions are presented.

I.

The right to a trial by jury is satisfied by the two-tier court system. *Ludwig* v. *Massachusetts,* 96 S.Ct. 2781 (1976) at page 2781 said,

> "...The Supreme Court, Mr. Justice Backmun, held that the Massachusetts two-tier court system does not deprive an accused of his Fourteenth Amendment right to a jury trial and does not unduly burden that right; the Court further held that the Massachusetts procedure does not violate the double jeopardy clause of the Fifth Amendment as it is made applicable to the states by the Fourteenth Amendment."

II.

The constitutional right of trial by jury does not extend to trials for violation of city ordinances in municipal courts.

COSTELLO v. *FLAGIN,* 169 Ala. 191, 50 So. 134

EX PARTE STATE EX REL CITY OF BIRMINGHAM, 164 Ala. 576, 51 So. 309

CITY OF BIRMINGHAM v. *WILLIAMS,* 229 Ala. 101, 155 So. 877

DONAHEY v. *CITY OF MONTGOMERY,* 43 Ala.App. 20, 178 So.2d 832

SEC. 12-14-6, CODE OF ALABAMA 1975

Birmingham v. *Evans,* 53 Ala.App. 358, 300 So.2d 396

Ex parte Hall, 255 Ala. 98, 50 So.2d 264

Hawkins v. *City of Birmingham,* 380 So.2d 994

Holderfield v. *City of Birmingham,* 380 So.2d 990

Howell v. *City of Birmingham,* Ala.Crim.App. 6 div. 916 (Ms. January 22, 1980)

State v. *Luck,* 353 So.2d 225 cited by Petitoners' Brief at page 12 does not appear to be applicable to the cases at bar because (1) It was a state prosecution rather than municipal; (2) The penalty imposed by L.A.R.S. 14-106 G (a fine of not less than $100 nor more than $1000 or imprisonment in the parish prison for not more than one year or both) entitled the defendant to a jury trial. The potential penalty in *Luck* far exceeded the City's maximum fine of $500, or imprisonmnet in the City jail not exceeding six months or both.

Duncan v. *La.,* 391 U.S. 145, 88 S.Ct. 1944, held in offenses where the sentence is six months or less the right to jury trial may be constitutionally denied. Further, Sec. 12-14-6, Code of Alabama, 1975, and all the cases cited have addresed this question.

Section 12-14-6, Code of Alabama 1975 states:

> "All cases in municipal courts shall be tried by a judge without a jury."
> (Acts 1975, No. 1205, §8-101)

It is well established in this state that a prosecution for a municipal offense is a quasi-criminal proceeding and that, as a general rule, constitutional and statutory provisions, having reference to criminal prosecutions by the state, are not applicable to violations of municipal ordinances. *McKinstry* v. *City of Tuscaloosa,* 172 Ala. 344, 54 So. 629.

III.

In order for the constitutional right to a jury trial to be raised there must be a demand for a jury trial and a refusal by the court to grant it.

In *Duncan* v. *La.*, 88 S.Ct. 1444 at p. 1448 it says, "...We hold that the Constitution was violated when appellant's demand for jury trial was refused."

At page A.5 of Petitioners' Brief, the Court of Criminal Appeals of Alabama stated: "Additionally, we note the defendant never requested a trial by jury in the municipal court. . . ."

Based on this opinion, the City contends that since the Court found that a jury trial was never demanded by either Petitioner, each waived it and neither can be heard to complain now. (See also A.10, Appendix C of Petitioners' Brief, paragraph two.)

IV.

With reference to the alleged conscious, intentional discriminatory enforcement of the obscenity ordinance by the City against Petitioners, their brief referred to the case of *Simonetti* v. *City of Birmingham*, 55 Ala.App. 163, 314 So.2d 83, (1975). The City agrees that this case is material and that the following quotation at page 92 is a correct statement of the law.

> "All the cases recognize that a heavy burden rests on the defendant to establish conscious, intentional discrimination, but if successful in sustaining that burden, the defendant will be entitled to a dismissal of the prosecution as a matter of law . . .".

The City contends this heavy burden has never been met by either Petitioner.

In their brief at page 29, Petitioners cited *John F. Lawhon Furniture Company* v. *Melvin Bailey* (D.C. Ala. CA 72-1109) a Blue Law case, but failed to quote Honorable Sam C. Pointer, Jr., *FINDING OF FACT AND CONCLUSION OF LAW:*

> "I'm persuaded that there is no intentional wrongdoing on the part of the Sheriff's Department in the sense of any willful intent to pick out Lawhon to the exclusion of others.
>
> I'm also persuaded and convinced that there has been unequal enforcement by the sheer practicalities involved, that in fact the stores have not all been treated the same. I think it is understandable that with a lawsuit in which Lawhon has been involved, suing the Sheriff's Department and which it has made advertisements when it was going to be open on Sunday, it is very logical and understandable why the Sheriff's Department, with the red flag waved before it, would respond and make arrests when Lawhon opened on Sunday. Twice that has happened during the period in question this year."

In the present cases, as in *Lawhon,* there was no intentional wrongdoing by the Birmingham Police Department. Further there is no evidence that lawsuits have been filed by Petitioners against the Birmingham Police Department nor did they advertise they would continue to operate Bessemer News and Pussycat Adult Theatre. Neither Petitioner waved a red flag at the Birmingham Police Department, nor was there any unequal enforcement by the City in either case based on any practicalities involved.

There are many cases dealing with the question of discriminatory enforcement of the law. The vast majority have concluded that to sustain a claim of discriminatory enforcement there must be evidence of intentional or purposeful discrimination. The universal way of establishing such is by proof that the enforcement if by race, religion or some other improper classification

or as the result of some other ill-motive such as possibly to embarass a political candidate or punish an enemy. In all cases the issue is the pattern of enforcement. The following citations all adhere to the above stated propositions of law:

1. *Oyler* v. *Boles,* 368 U.S. 448, 82 S.Ct. 501;
2. *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397;
3. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064;
4. *People* v. *Wegman's Food Market, Inc.,* 362 NYS2d 902;
5. *People* v. *Lofton,* 366 NYS2d 769;
6. *Goodman* v. *Kennedy,* 329 A2d 224;
7. *Mulhern* v. *McHenry,* 326 A2d 132;
8. *Gutknecht* v. *City of Sausalitio,* 117 Cal.Rptr. 782;
9. *People* v. *Dobbs Ferry Medical Pav. Inc.,* 332 NYS 168;
10. *State* v. *Solomon,* 254 S.C. 550, 141 SE 2d 818;
11. *People ex rel Moylan* v. *Kur,* 350 NYS2d 990;
12. *United States* v. *Elliott,* 266 F.Supp. 318;
13. *State* v. *Deddens,* 542 P2d 1124;
14. *People* v. *Thomas,* 542 P2d 387;
15. *People* v. *Plamondon,* 236 NW2d 86;
16. *United States* v. *Brookshire,* 514 F2d 786.

Assuming arguendo that Cary Hawkins and Michael Holderfield have carried their heavy burden and presented evidence which created a strong inference of discriminatory prosecution, then the government according to *Associated Industries of*

Alabama v. *State,* 314 So.2d 879, 55 Ala.App. 277, is required to explain it away, if possible, by showing the selection process rested upon some valid ground. This the City of Birmingham has also done. The transcripts and City's Exhibits #1, each prove that the arrests made by the City involved subject matter containing actual sex acts, or obscene matter (not nudes or simulated sex). There were about five to seven arrests made by the City involving subject matter substantially similar to "Sperma," since the year 1978. The latter contained explicit sexual conduct or obscene matter (not nudes or simulated sex).

Cary Hawkins was arrested for the sale of the alleged obscene matter "Locker-Room Workout." During the time from January and May 1978, the officer also visited Seven-Eleven Stores that offered for sale Hustler, Playboy, Oui, Penthouse but made no arrests.

At pages 21 and 28 of Petitioners' brief they quoted *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350, 38 S.Ct. 495. Omitted, however, was the following sentence found at page 495, "The good faith of such officers and the validity of their actions is presumed; when assailed, the burden of proof is upon the complaining party."

At the same page (21) *People* v. *Utica Daw's Drug Co.* was quoted. It is also expressed at 225 NYS2d at p. 136, ". . . It is only when the selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others that a constitutional violation may be found." The Appellee/Respondent agrees with this proposition of law which it contends is supported by both transcripts in that there was no discrimination against the persons prosecuted and there was a general enforcement against others in their class (those allegedly selling obscene matter).

The City denies Michael Holderfield's allegation of intentional discriminatory enforcement by Officer Dennis McNutt. His instructions were to go to the adult bookstores in Birming-

ham and check for possible violations of General City Code 16-18, as amended. The Birmingham Police Department did not exercise prosecutional discretion by arresting Michael Holderfield nor was this section of the City Code enforced against him or anyone else based on an unjustifiable standard such as race, religion, or other arbitrary classification. A purchase was made by Vice Officer Dennis McNutt, but his superiors neither ordered him to make a purchase from a particular store nor to arrest a certain individual.

The City also denies Cary Hawkins' allegation that there was an intentional discriminatory enforcement of Birmingham's obscenity Ordinance 16-18, as amended, against him. Officer McNutt was never instructed by his superiors to go to a particular bookstore.

To show that the police are discriminating, the defendant has the burden, *inter alia,* to show that constabulary are acting with malice toward him. See *People* v. *Utica Daw's Drug Co.,* 16 A.D.(1963) 2d 12, 225 NYS2d 123, and *Two Guys* v. *McGinley,* 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961). That burden Petitioners have not satisfied. *They are entitled to equal protection of the law, not protection from the law.* (Emphasis Added)

Central to his alleged discriminatory enforcement attack is the applicability of *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) and *Oyler* v. *Boles,* 368 U.S. 448 (1961). The provisions of Birmingham's obscenity statute do not facially violate either Michael Holderfield's nor Cary Hawkins' constitutional rights. As set forth in *Oyler* v. *Boles,* supra, the Court recognized the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.

It is permissible for law enforcement officials to select "test" or "notoriety" cases for prosecution. There are always those who escape prosecution. Here, *neither* of the *Petitioners' evidence have met* the *heavy burden* of proving *unequal enforcement* by *city officials* - that the obscenity laws have not

been enforced equally against all violators with the same intensity as against them. Moreover, assuming arguendo, a disparity of treatment between Petitioners and others similarly situated, neither have demonstrated that this *difference in enforcement* is based upon a decision to enforce the law against them because of any improper motive. (Emphasis Added)

The burden of explanation should not be shifted to the City of Birmingham. Each Petitioner should first establish a *prima facie* case of discrimination. More than mere unequal enforcement is required to constitute discrimination of the sort condemned as unconstitutional in *Yick Wo*. For the unequal enforcement to be discriminatory against any defendant, he must show either that the disparity is based upon some constitutionally impermissible standard, such as race, religion, or other aribtrary classification. This, neither Petitioner has done.

There was a marked distinction made by Officer McNutt in describing the matter in Playboy and Penthouse (alleged sales or offer of sale in various stores, Seven-Eleven Stores) which he testified contained nudes and simulated sex acts *in comparison with* the book before this Honorable Court, City's Exhibit 1 introduced in evidence, "Color Sperma." (Emphasis Added) The latter graphically depicts act or acts of sexual intercourse, fellatio.

In Cary Hawkins case there was an investigation of "Club Magazine" at a U-Tote-M Store but no arrest was indicated. In addition other Seven-Eleven Stores in the City of Birmingham were visited by Officer McNutt between January and May 1978 on approximately two occasions where magazines such as Hustler, Playboy, Oui, Penthouse were being offered for sale but no arrests were made.

The juries found that the subject matters allegedly sold on May 10, 1978 in each case at Bessemer News and The Pussycat Adult Theatre were obscene. The City contends this placed each defendant in a class of stores selling matter explicitedly depict-

ing the performance of actual sex acts and were prosecuted by the City. Each subject matter met the guidelines or elements as set forth in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1974).

The law as set forth in *Miller* was satisfied when there was depicted actual sexual acts between individuals, but this is not true regarding the magazines offered for sale at other stores in Birmingham which contained pictures of nude bodies and simulated sexual activities.

If there is a jury trial in the Circuit Court, the jurors have not only the right but the duty to determine if the matter in issue is obscene and convict if the evidence so warrants, and that is exactly what they did in each of the cases at bar.

In their brief on page 21, *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, was cited which *admits* the City of Birmingham's contention that the *heavy burden rests on the defendant* to *establish conscious, intentional discrimination.* (Emphasis Added).

As long as the enforcement is not designed to discriminate against a particular individual in a particular class it would not be held discriminatory. If an act cannot be enforced equally, it would be facially void. No proof has been adduced establishing an evil motive on the part of the City resulting in this code section being discriminatorily applied to either one of the Petitioners.

V.

A conclusionary affidavit along with the presentation of the alleged obscene matter to the magistrate will support the finding of probable cause.

Paragraph three (3) under Petitioners' Appendix A, A.7 (Opinion of the Court of Criminal Appeals of Alabama) regard-

ing Petitioners Michael Holderfield and the (Court's Opinion) in Cary Hawkins, Appendix C, A.10 has adequately addressed the above issue.

In Michael Holderfield's case, the magistrate examined the book and read "Color Sperma" for ten (10) minutes while in Cary Hawkins' case the magistrate read "Locker-Room Workout" for about fifteen (15) minutes before issuing the respective arrest warrant.

VI.

In passing on the validity of an arrest warrant, the reviewing court is not restricted to examining the four corners of the affidavit.

UNITED STATES V. *CHARACTER,* 568 F2d 442

KNOX V. *STATE,* 172 So.2d 787, 42 Ala. 578

It is obvious that the examination of each subject matter by the magistrate satisfied any defect in the affidavit, if any, that existed in the arrest warrants.

The Appellee/Respondent understands that this Honorable Court has requested all exhibits introduced in evidence in both cases be forwarded for review. This will enable the Court to examine City's Exhibit No. 1 in each case, "Color Sperma" and Locker-Room Workout," *in comparison with* Petitioners' Exhibits, to-wit: Hustler, Swank, Erotic Art of the Masters, High Society and Velvet.

Our contention is that all three criteria as enunciated in *Miller* coalesced in City's Exhibit No. 1 in "Color Sperma" and "Locker-Room Workout" as evidenced by the jury's verdicts; the element of *patently offensive* is *lacking* in each of *Petitioners' exhibits.* (Emphasis Added)

In *Jenkins* v. *Georgia,* 94 S.Ct. 2750, the judgment of the Supreme Court of Georgia was reversed and at page 2755 this Honorable Court said:

> "[9] Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the Miller standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in Miller of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards.
>
> Appellant's showing of the film 'Carnal Knowledge' is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in Miller, Id., at 35, 93 S.Ct. at 2621. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia."

At page twenty two (22) of Petitioners' brief they alleged that the uncontradicted evidence is that arrests in the City of Birmingham for violation of its obscenity ordinance were directed

only against operators or employees of adult book stores and adult theatres. There were six to eight such adult book stores which sold publications depicting or describing the sexual conduct described in the City's obscenity ordinance. At the same time there were hundreds of drug stores, convenience stores, or other business establishments open to the general public which regularly sell publications depicting sexual conduct in presumptive violation of the City's obscenity ordinances and not one of these operators or employees has ever been arrested or tried for violating this same ordinance.

By inference, *Jenkins* v. *Georgia* draws a distinction between hard core sexual conduct or obscenity and soft core sexual conduct or obscenity the former being punishable when the three criteria coalesce as enunciated in the landmark case of *Miller* v. *California,* 93 S.Ct. 2607. "Carnal Knowledge" contained nudity but the camera never focused on the bodies of the actors during the ultimate sex scenes. The "patently offensive" element in *Jenkins* v. *Georgia* was not found to exist by this Honorable Court and, therefore, the judgment of the Supreme Court of Georgia was reversed. Likewise the non-adult book stores or other business establishments whose operators or employees have not been arrested by the City of Birmingham for alleged violation of its obscenity ordinance (as set forth on page twenty two (22) of Petitioners' brief) apparently were engaged in the sale or offer for sale of material depicting soft core sexual conduct or pornography which did not meet the three *Miller* criteria during the time frame involved prior to or on the date of the sales of "Color Sperma" and "Locker-Room Workout" took place.

If a prosecutional classification was made by the City of Birmingham in making obscenity arrests as alleged by the Petitioners at page twenty two (22) of their brief, it was for hard core obscenity rather than soft core obscenity as enunciated in *Miller* which is a reasonable classification. The six to eight stores falling within this particular classification were subject to

arrests. The City of Birmingham's actions have not been arbitrary, capricious or discriminatory against either Petitioner, as compared with other persons in similar circumstances (other adult book stores and adult theatres) nor has the public authority of the City of Birmingham administered the Birmingham obscenity ordinance against either Petitioner with an evil eye or unequal hand.

CONCLUSION

For the foregoing reasons, Writs of Certiorari should be denied the Petitioners by this Court to review the opinions and judgments of the Alabama Court of Criminal Appeals.

Respectfully submitted,

W. O. MacMahon III
600 City Hall
Birmingham, Alabama 35203
Telephone: 205/254-2369
Attorney for Appellee/Respondent